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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. .....

CHARLES GARVIN and E. L. ISENBERG,
Petitioners,

v.

WILLIAM HARRY CHILDERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Charles Garvin and E. L. Isenberg, the petitioners herein, pray that a writ of certiorari issue to review the judgment or order of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on June 26, 1967.

OPINION BELOW

The opinion or order of the Circuit Court of Appeals for the Sixth Circuit is unreported and is printed in Appendix A hereto, *infra*, Page 9.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). Order Staying Mandate issued August 9, 1967, granting stay of execution pending the within application.

QUESTION PRESENTED

The question presented is whether or not the Petitioners, as defendants in a tort action tried before a jury in the District Court, were denied due process of law. The District Judge refused to permit them to read the deposition of an absent witness, the deposition having been taken by way of discovery by adverse counsel and the testimony contained therein being important to the defense of the case.

STATUTE INVOLVED (FEDERAL RULE OF CIVIL PROCEDURE)

Federal Rule of Civil Procedure 26(d) (3)-3 is, in part, as follows:

> "The deposition of a witness, whether or not a party, may be used by any party for any purpose if the Court finds . . . or 3, that the witness is unable to attend or testify because of age, infirmity or imprisonment;"

The Fifth Amendment to the Constitution of the United States, or the part involved in this appeal is as follows:

> "No person shall . . . . be deprived of life, liberty or property without due process of law."

STATEMENT

This suit was brought in the United States District Court for the Western District of Kentucky, Bowling Green Division, against the Petitioners, both of whom are citizens of Kentucky, by the Respondent, who is a citizen of North Carolina, and this diversity of citizenship is the basis for Federal jurisdiction in the court of first instance.

The complaint charged assault and battery and an unlawful arrest by a special deputy jailer, Petitioner E. L. Isenberg, acting as an employee of the Petitioner Charles Garvin, who owns the amusement park where the occurrence took place.

The answer admitted the arrest but alleged that it was not unlawful and denied assault and battery.

It was uncontroverted in the trial before the jury that a disturbance involving several people occurred at the go-cart track located in the park.

The Respondent, who was the plaintiff in District Court, admitted his presence at the go-cart track while the ruckus was taking place, but he said, and offered proof, that the Petitioner Isenberg erroneously mistook him for one of those who was engaged in the disturbance.

The Petitioners, who were the defendants in District Court, contended and offered proof that Respondent was in fact one of those taking a very active part in the disturbance.

Several were placed under arrest.

The real question of fact then was one of identity, "was he (the Respondent) or was he not one of the misdemeanants?" If he was, he was lawfully placed under arrest.

A witness, Wallace Gross, an employee of the Defendant-Petitioner Garvin at the amusement park, had indicated his willingness to testify as a witness in behalf of Garvin in that he had voluntarily made one or more trips to Mr. Garvin's lawyer's office in preparing the defense; had voluntarily appeared and given his deposition to the Respondent's counsel by way of discovery without subpoena; had appeared and waited at the Courthouse during the first day of jury trial and had appeared on the second day and waited at the Courthouse for a few hours, all without subpoena.

Before the case was actually completed for the defense, this witness, Wallace Gross, got some creosote in his eyes, and thus became sick and infirm within the meaning of FR 26(d) (3)-3.

Apparently what happened was the witness, before Court convened on the second day of trial, assisted his other employer, Ennis and Hearldson, in loading or unloading some electric utility power line poles.

The poles had been impregnated with creosote as a preservative and some of the creosote got on Mr. Gross's hands and when he rubbed his eyes with his hands, enough creosote got in his eyes to cause him a lot of pain.

Without advising anybody, and without permission, he left the Courthouse and told no one where he was going or where he would be. All efforts to locate him during the rest of the trial were unsuccessful.

It appearing that testimony of Mr. Gross could not be obtained in person, the Petitioners offered, as their last piece of evidence, to read Mr. Gross's deposition that he had given on discovery.

In this deposition Mr. Gross stated positively that the Respondent was one of those causing the disturbance at the go-cart track.

The Respondent objected to the reading of the deposition and the District Court, warning the Respondent that he "may be courting error," sustained the objection and refused to permit the Petitioners to read the deposition to the jury.

The deposition, if it had been read to the jury, would have been of value in establishing the identity of the Plaintiff-Respondent as one of the persons who was involved in the disturbance and therefore properly arrested.

The deposition is persuasive in behalf of the defense and may have been made a difference in the outcome of the jury trial.

REASONS FOR GRANTING THIS WRIT

It is the argument of the Petitioners that this restrictive interpretation of Federal Rule 26(d)(3)-3, so as to prevent the defendants in a damage suit trial before a jury from using a deposition taken by adverse counsel, is in violation of the Petitioner's constitutional right to a fair trial and deprives him of his right not to be deprived of his property without process of law.

It is granted that it would have been better if the Petitioners had placed Mr. Gross under subpoena.

It is understandable, however, that the Petitioners had every reason to believe that he would be present when called to testify and that the issue and service of subpoena would merely add to the costs of the litigation.

And under the circumstances in this case, can it be said that Mr. Gross would have acted any differently if he had been under subpoena?

A man with residual creosote in his eyes does not think too much of the niceties of his technical legal position.

It is granted further that in the orderly administration of justice, it is preferable that witnesses testify in person.

It was certainly preferable from the standpoint of the Petitioners-Defendants that their witness testify in person for he was their witness and his affidavits as to what he could testify to show that his personal testimony would have been stronger in behalf of the Defendants-Petitioners than his deposition, which was given under adverse questioning.

But the question is—should the policy favoring the orderly trial of an action outweigh the right of the jury to know all of the competent and relevant facts and the right of the party defendant to present all of his lawful defenses?

There is a scarcity of authority from the lower courts on this question. There seems to be a tendency of the lower courts, with exceptions, to allow a jury to hear depositions read where the witness is not available to testify.

In *Inland Bonding Company v. Mainland National Bank of Pleasantville*, a 1944 United States District Court of New Jersey case, 3 F.R.D. 438, cited in 8 Federal Rules Service 26c.3, case 1, it was held that a deposition can properly be read to the jury even though the party objecting to the reading of the deposition had lost his opportunity to cross-examine the witness whose deposition was offered. The opportunity to cross-examine was unfortunately lost when the objecting party had agreed to a continuance of the taking of the depositions because of ill health of the witness, and the witness died before he could be cross-examined.

In *Houser v. Snap-on Tools Corp.*, a 1962 case in the Maryland District Court, 202 F. Supp. 181, the Court

permitted the deposition of a witness to be read to the jury when the deponent was in a hospital at the time of the trial.

Modern Federal Practice Digest, "Federal Civil Procedure," Vol. 4, Sec. 26.30, page 1665.

In those instances where the orderly trial will be upset very little if there is a slight departure from the usual method of presenting testimony, as is the case here, it is respectfully submitted that the Courts should allow the slight departure required to allow all the proof to go before the jury.

It is Petitioners' position that the fundamental rights of the litigants to have their case fully presented is essential to a fair trial and that the ruling of the District Court refusing this right to these Petitioners denies them the due process of law guaranteed to them under the Fifth Amendment.

I do not find that this Honorable Court has ever passed on the precise question here presented.

It is respectfully submitted that it should and thus define more clearly the extent of protection the Fifth Amendment affords to litigants.

Does due process include the right to read the deposition of an absent witness under the circumstances of this case? This question is a matter of public interest and concern.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

MARSHALL FUNK,
431 East Tenth Street,
Bowling Green, Kentucky,

Attorney for the Petitioners.

Appendix

NO. 17,343

In The
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM HARRY CHILDERS,
Plaintiff-Appellee,

v.

CHARLES GARVIN and
E. L. ISENBERG,
Defendants-Appellants.

ORDER

FILED June 26, 1967

Before: WEICK, Chief Judge, O'SULLIVAN, Circuit Judge, and CECIL, Senior Circuit Judge.

This cause is before the Court on appeal from a judgment, in favor of the plaintiff, in the United States District Court for the Western District of Kentucky, at Bowling Green. The action was in tort in which William Harry Childers, plaintiff-appellee, charged Charles Garvin and E. L. Isenberg, defendants-appellants, with false arrest and assault and battery.

The case was tried before a jury and a verdict was returned in favor of the plaintiff-appellee in the sum of $20,355. Judgment was entered on the verdict and the defendants-appellants appealed. It is claimed that the

trial judge erred in refusing to admit the deposition of a witness who had been in the court room during the progress of the trial but left before he was called as a witness and in refusing to set the verdict aside for the reason that it was excessive.

The appeal was submitted to this Court upon the record in the trial court, the briefs, appendices and oral arguments of counsel.

Upon consideration the Court finds that the claims of the defendants-appellants are without merit.

It is therefore ordered that the judgment of the District Court be and the same is hereby affirmed.

Entered by order of the Court.

/s/ CARL W. REUSS
Clerk

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 595

CHARLES GARVIN and
E. L. ISENBERG, - - - - - Petitioners,

versus

WILLIAM HARRY CHILDERS, - - Respondent.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND REQUEST FOR DAMAGES FOR UNWARRANTED DELAY.

MAXEY B. HARLIN,
CHARLES E. ENGLISH,
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Bowling Green, Kentucky,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 595

CHARLES GARVIN and
E. L. ISENBERG, - - - - - - *Petitioners,*

v.

WILLIAM HARRY CHILDERS, - - *Respondent.*

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND REQUEST FOR DAMAGES FOR UNWARRANTED DELAY.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

William Harry Childers, Respondent herein, prays that the request for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above styled case on June 26 of 1967 be denied. The Respondent also respectfully requests the Court to award damages to the Respondent for unwarranted delay in the satisfaction of his judgment obtained in the United States District Court for the Western District of Kentucky.

I. CITATION TO OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is printed in Petitioners' Appendix, pages 9-10.

II. JURISDICTION.

The jurisdiction of this Court is sought pursuant to the provisions of 28 USC Sec. 1254(1).

III. QUESTIONS PRESENTED.

1. Have the Petitioners raised an issue over which this Court has jurisdiction?

2. Even if the Lower Court erred in excluding the deposition of the absent witness, was such error harmless and of no effect upon the result of the trial?

3. Is the Respondent entitled to damages for unwarranted and unreasonable delay as authorized by 28 USC Sec. 1912(19) and Rule 56(2) of the United States Supreme Court?

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Petitioners maintain that the Fifth Amendment to the Constitution of the United States is involved which the Respondent denies. The applicable portions of Fed. R. Civ. P. 26(d)(3)-3 and the Fifth Amendment are printed in Petitioners' brief on page 2.

V. COUNTER-STATEMENT OF CASE.

The Petitioners' statement is substantially correct, but fails to disclose two important facts.

First, even though it is alleged that the witness, Gross, was sick and infirm within the meaning of Fed. R. Civ. P. 26(d)(3)-3, he was not sufficiently sick and infirm to require medical attention.

Second, several other witnesses observed the incident in question and testified at the trial for the Petitioners.

VI. ARGUMENT.

Question I.

Have the Petitioners raised an issue over which this Court has jurisdiction?

The question which the Petitioners seek to raise concerns the reading of a deposition of an absent witness at a civil trial for damages. The learned trial judge overruled Petitioners' request and the entire record was thoroughly reviewed by the United States Court of Appeals for the Sixth Circuit.

A cursory examination of the Petitioners' brief discloses that the principle involved is only of alleged importance between the parties. A writ of certiorari is not conferred merely to give the defeated party in the Lower Courts another hearing. *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 67 L. Ed. 922, 43 S. Ct. 531.

The only reference in the Petitioners' brief that even pretends to invite the attention and jurisdiction

of the Court to grant the writ of certiorari is a vague reference to "Public Interest and Concern" in the last paragraph. Rule 19[1] of the Supreme Court of the United States sets forth "Considerations Governing Review on Certiorari." The Petitioners' brief discloses absolutely no basis within the purview of Rule 19 for the Court to invoke its jurisdiction. Certiorari is granted only in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal. *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 95 L. Ed. 479, 71 S. Ct. 453.

Petitioners fail to make any allegation of a conflict between the various Courts of Appeal in either

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[1]Rule 19: *Considerations Governing Review on Certiorari.* 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court. (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision. 2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

the interpretation or application of Fed. R. Civ. P. 26(d)(3)-3. In fact Petitioners' brief concedes the frivolity of his claim by failing to cite a single case in point.

In the absence of an allegation of a question of public importance or a conflict between the various Courts of Appeal, the Supreme Court of the United States does not have jurisdiction to review a case on a writ of certiorari.

Question II.

Even if the Lower Court erred in excluding the deposition of the absent witness, was such error harmless and of no effect upon the result of the trial?

FR 61[2] requires that all errors which no not affect the substantial rights of the parties must be disregarded. The testimony contained in the deposition of Gross could not have affected the outcome of the trial. The deposition was short and contained no absolute identification or association of the plaintiff with improper conduct as asserted by the defendants. *Most of the asserted facts which might have aided the defendants in the presentation of their case are contained in Gross' after trial affidavits rather than the offered deposition.* Defendants' own statement of facts ad-

[2]Fed. R. 601.01: *Harmless Error.* No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties is ground for granting a new trial or setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless refusal to take such action appears to the Court inconsistent with substantial justice. The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not effect the substantial rights of the parties.

mits that Gross was not present when Mr. Isenberg beat and arrested the plaintiff.

The lack of substantive value contained in the testimony of Gross's deposition was recognized by defendants' trial counsel. Defendants' trial counsel stated to the Court:

> "Mr. Huddleston: —but to clarify our position, the practical consideration here is not the import of the testimony itself. The deposition taken does support the position of the defendants in this case. Our practical consideration is that the failure to appear and give any evidence, in the absence of anything to the contrary shown by the jury, can be construed by the jury or by counsel, as the suppression of testimony which by inference might be regarded as unfavorable to the position of the defendants and in pursuing the matter at this time, I ask the Court, having overruled our request to read the deposition, to advise counsel not to make that sort of inference in closing argument . . .
>
> The Court: . . . You don't want your arguments taken down do you?
>
> Mr. Huddleston: Yes, I am afraid so, because I am afraid Mr. English is going to speak about this absent witness.
>
> The Court: He may not do it. He may not court that error.
>
> Mr. Huddleston: If I feel sure that he won't do it.
>
> Mr. English: I haven't heard your argument yet.
>
> The Court: Well, if you can agree to leave it out unless you are willing, just say nothing about it.

Mr. Huddleston: I would agree to this, say nothing.

The Court: The jury knows nothing about it one way or the other. As a matter of fact, I doubt if the jury remembers anything, his name being used in the case. I know I didn't, so why not let the thing go and say nothing about it and won't have to take this argument down. Is that agreeable?

Mr. English: Yes, sir."

Defendant's trial counsel, recognizing the lack of practical import of the substantive testimony contained in Gross's deposition, did not pursue the matter further when it was agreed that no reference to Gross's failure to testify would be mentioned in the closing argument and consequently any possible error was cured.

Exclusion of evidence is harmless where the evidence, though admissible, is of little or no value in determining the issues in the case. *Barron and Holtzoff, Federal Practice and Procedure,* Sec. 1353 (Rules Edition 1961—1966 Pocket Part).

Any facts which could have been established by reading Gross's deposition were already established by other witnesses. Gross's deposition contained no first hand facts that were peculiarly within Gross's knowledge. Other persons who testified were present at all times with Gross and accounted for anything which he might have observed. The defendants' witness, Young, was present at the Go-Cart tracks the entire period and the defendant, Garvin, was with Gross the remainder of the time. No event or period of time could be exclusively accounted for by Gross. At most, his

testimony would have been cumulative. Any error in excluding evidence of a fact already established by other evidence is harmless. *Barron and Holtzoff, Federal Practice and Procedure,* Sec. 1353 (Rules Edition 1961); *Smith* v. *Bear,* 237 F. 2d 79, 89 (2d Cir. 1956); and *E. I. DuPont De Nemours and Company* v. *Wright,* 146 F. 2d 765, 768 (6th Cir. 1945); Certiorari denied 65 S. Ct. 1017, 324 U. S. 873, 89 L. Ed. 1426.

Question III.

Is the Respondent entitled to damages for unwarranted and unreasonable delay as authorized by 28 USC Sec. 1912(19) and Rule 56 of the United States Supreme Court?

In these turbulent times when the Bar, Courts and Government are under close public scrutiny and when public attitude must be respectfully cognizant of law, order and the judicial processes, the Respondent submits that the Courts must jealously guard the channels of justice to assure the public that they do not become clogged with cases involving parties who seek to delay rather than respect and abide by the Courts' decisions.

The petition and record filed with the Court in this case show nothing more than a frivolous attempt to delay a young man from obtaining justice. The only reason this petition was filed was to delay satisfaction of the judgment below. The Petitioners have been unable to raise any sincere appealable issues. The only point which they have sought to raise concerns the reading of the deposition of the absent witness and the Respondent respectfully submits that this issue is wholly frivolous, vexatious and without merit. This

point is borne out by the colloquy and admissions of Petitioners' counsel that occurred at the bench during the course of the trial. (This colloquy is printed in the discussion of the Respondent's second question.)

28 USC Sec. 1912[3] and Rule 56(2)[4] of the United States Supreme Court specifically authorize the Court to award damages as a penalty for unwarranted delay. The only way this Court can discourage frivolous and vexatious petitions is to exercise its power to award damages in proper cases where the parties have been subject to delay without reasonable cause. The Court's power to compensate for unwarranted delay should not be overruled. *Whitney* v. *Cook,* Miss. 1879, 99 U. S. 607, 9 Otto. 607, 25 L. Ed. 446; *Mason* v. *Summer Lake Irr. Dist.,* C. A. Or. 1954, 216 F. 2d 609, certiorari denied 75 S. Ct. 357, 348 U. S. 937, 99 L. Ed. 734, rehearing denied 75 S. Ct. 450, 348 U. S. 960, 99 L. Ed. 749.

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[3]28 USC Sec. 1912: *Damages and costs on affirmance.* Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

[4]Rule 56: (U. S. Supreme Court) *Interest and Damages.* (2) In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, may be awarded upon the amount of the judgment.

VII.

CONCLUSION.

For the foregoing reasons, the Petitioners' certiorari should be denied and the Respondent awarded damages for unwarranted delay.

Respectfully submitted,

MAXEY B. HARLIN,
CHARLES E. ENGLISH,
HARLIN, PARKER, RICKETTS,
LUCAS & ENGLISH,
519 East Tenth Street,
Bowling Green, Kentucky,
Attorneys for Respondent.

CERTIFICATE OF SERVICE.

I, Maxey B. Harlin, Counsel for William Harry Childers, Respondent, in the matter styled "Charles Garvin and E. L. Isenberg v. William Harry Childers," do hereby certify that I served a true copy of the foregoing Brief in Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, and Request for Damages for Unwarranted Delay on the Petitioners on _____, 1967, by depositing same in a United States mailbox, with first class postage prepaid, addressed to Marshall Funk, 408½ East Tenth Street, Bowling Green, Kentucky and Paul Huddleston, 1032 College Street, Bowling Green, Kentucky, Counsel for Petitioners.

MAXEY B. HARLIN.